Petition

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No.

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1981

JOSEPH D. ST. MARTIN,
Petitioner

v.

R. M. HEGEWALD and HELEN HEGEWALD,
husband and wife,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF WASHINGTON
IN CASE NO. 4074-II

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QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner deprived of due process when the Washington Supreme Court in 1978[1] held his tenants in common interest in land should not be awarded to him in kind in that the unusual property involved, worth $300,000 would be worth only $200,000 if partitioned in kind but later in 1981[2] held that a sale to Hegewald, a co-tenant and the only bidder for $194,000, a sale that should be confirmed as it did not violate petitioner's due process protection rights guaranteed under the Fourteenth Amendment to the U.S. Constitution or Article 1, Section III of the Washington State Constitution.

2. Can the 1978 decision of the Washington Supreme Court be reconciled

(1) Hegewald v. Neal, 20 Wash. App. 517, 582 P2 529 (1978) 91 Wn. 2d 1007 (1978)

(2) Hegewald v. Neal, 28 Wash. App. 783 __P2__ 1981, 95 Wn. 2d 1029 (1981).

with its 1981 decision without violation of petitioners substantive and procedural due process rights.

3. Did the due process guarantee of the Fourteenth Amendment of the U.S. Constitution require the Washington Courts to follow the rule of their decision in Olympic Forest Products, Inc. v. Chausee Corp. and to thus adopt a procedural rule tailored to prevent the unfairness that resulted when Hegewald purchased the tenant in common property in gross for $194,000, $106,00 less than he had earlier claimed the land was worth if partitioned in kind?

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I	
The decision of the Supreme Court of the United States, and courts of last resort in other states require state courts under the due process mandate of the Constitution of the United States to adopt, in the absence of the state requirements, rules that prevent a taking of a citzens private property without just compensation.	10

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This Court should grant a writ to resolve the ambiguity that presently exists under the Washington law promulgated by its two conflicting decisions in Hegewald v. Neal, and which leave a tenant in common with no dependable guidelines as to how he can protect a taking of his land without just compensation. 14

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October Term, 1981

JOSEPH D. ST. MARTIN,
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vs.

R. M. HEGEWALD and HELEN HEGEWALD,
husband and wife,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner, Joseph D. St. Martin, prays that a Writ of Certiorari issue to review the order and decree of The Supreme Court of the State of Washington which was entered on the 17th day of July, 1981, and finally denied petitioner's petition

for review of the decision of the Court of Appeals of the State of Washington filed on April 9, 1981.

The petition for review in the Supreme Court of the State of Washington requested that the last mentioned court determine that the decision of the Court of Appeals for the State of Washington affirming an order confirming sale of real property entered in the trial court violated due process protection of the Fourteenth Amendment to the United States Constitution and Article I, Section III of the Washington State Constitution.

OPINION BELOW

A copy of the decision of the Court of Appeals of the State of Washington, Division II appears at A-1 of the appendix to this petition and is reported at 28 Wn. App. 783 __ P2__ (1981). The decision appearing in Appendix A-1 makes

reference to an earlier related decision involving the same parties and in principal part, the same litigation. The earlier decision was filed on June 27, 1978, and appears at A-11 of the appendix. The latter mentioned opinion is reported at 20 Wash App 517, 582 P2 529 (1978).

PARTIES TO THE PROCEEDING

Frances Neal, as Guardian of Katherine Haines, and the successor, estate of Katherine Haines, are no longer parties to the litigation, having waived further appeal by accepting the proceeds of the sale of the real property involved in the litigation below. Joseph D. St. Martin acquired, other than the Hegewald interest, the remaining titles to the subject land. The trial court ordered petitioner's brothers and sister to convey to the petitioner herein in order to vest title in one person. The total minority tenant in common interest was one-third (1/3) with

Hegewald owning two-thirds (2/3). The petitioner owned one-fifth (1/5) or 20% of the land as a tenant in common.

JURISDICTION

The decree and order of the Supreme Court of the State of Washington was entered on July 17, 1981, denying petitioner's prayer to review the decision of the Court of Appeals of April 9, 1981. The jurisdiction of this Court is invoked under 28 USC 1257(3).

CONSTITUTIONS AND STATUTES INVOLVED

This case involved Article I, Section III of the Constitution of the State of Washington which provides:

> "No person shall be deprived of life, liberty or property without due process of law."

Also here involved is Section I of the Fourteenth Amendment to the Constitution of the United States which reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

> are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Washington Statute, RCW 7.52.130 provided:

> "If the referees report to the court that the property, of which partition shall have been decreed, or any separate portion thereof cannot be made without great prejudice to the owners, and the court is satisfied that such report is correct, it may thereupon by an order direct the referees to sell the property or separate portion thereof."

STATEMENT OF THE CASE

The Washington litigation involved a partition proceeding in which Respondents Hegewald sought a division by judicial sale of property which he owned as tenants in common with the original named parties defendant. A previous state appeal was

taken in this matter regarding the trial court's decision to order a sale of the property rather than physically partitioning the property. Hegewald v. Neal, 20 Wash. App. 517, 582 P.2d 529 (1978).

The property in question consisted of 240 acres of St. Martin's ancestral, native American homestead with a well known steelhead stream flowing through the northerly portion of it. The family cemetery is located on a portion of the land.

The land is unique in containing valuable hot mineral springs, which were used in conjunction with operating a hot mineral spring resort. The resort business commenced operating in the late 1800's and now is currently being operated under the name of Carson Hot Springs. The parties St. Martin are brothers and sister, with the three older brothers being allotted and enrolled members of the Yakima Indian Nation. Skamania County is located in the

State of Washington along the Columbia Gorge, approximately 50 miles from Portland, Oregon, and while very scenic has a very small population. The land in question has possible geo-thermal use potential.

The Washington trial court initially ruled that there should be a partition. Two of the three referees filed a report recommending that partition in kind not be made. One of the three referees submitted a report indicating the hot springs could be divided by a metered water system, and that partition in kind was otherwise quite possible. Although exceptions to the report of the two referees were made by petitioners, the Superior Court reversed itself and ordered a partition by sale.

Petitioners appealed from the Order of sale. Division II of the Court of Appeals affirmed the Order of Sale. In so

holding, the Court of Appeals found that "great prejudice to the owners" would result if the property were partitioned in kind. This finding is required by RCW 7.52.130 before ordering a partition by sale. To support this finding, the Court of Appeals referred specifically to the testimony of Hegewalds' expert witness, Jack Jarvis, indicating that the property, if partitioned in kind, would be of an aggregate value of only $200,000.00, whereas, Jarvis indicated, the fair market value of the property as a whole was $300,000.00. The Court of Appeals in its decision stated:

> We hold that the trial court's finding and conclusion of great prejudice is supported by substantial evidence that this unusual property worth $300,000 would be worth only $200,000 if partitioned in kind, and such a difference is properly termed a "substantial pecuniary loss."

Hegewald v. Neal, supra, Wash. App. at

534. Petition for review was denied by the Washington Supreme Court Hegewald v. Neal, 91 Wn.2d 1007, (1978).

Upon remand to the trial court, the date for the sale of the property was set as 27 February, 1979. Upon motion of petitioners the sale was postponed until 10 April, 1979. The property was sold on 10 April, 1979, to Hegewald, the only bidder, for his first bid amount of $194,000.00.

Petitioners timely filed exceptions and objections to a motion for an order confirming the sale. A hearing was held concerning such exceptions and objections.

The trial court confirmed the sale of the property to Hegewald for the sum of $194,000.00, and thereafter appeal of the trial court's order was affirmed by the Supreme Court of the State of Washington on July 17, 1981.

In his appeal from the order confirming sale, petitioner contended the sale

violated his due process rights in that Hegewald acquired the entire fee for a price the court had previously declared would cause great prejudice to the remaining owners. The final decision of the Washington Supreme Court approved the opinion of the Washington Court of Appeals which found petitioner's due process contentions unpersuasive and that a taking of property in a partition proceeding does not involve a "taking" in the Constitutional sense.

REASONS FOR GRANTING THE WRIT

I

THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, AND COURTS OF LAST RESORT IN OTHER STATES REQUIRE STATE COURTS UNDER THE DUE PROCESS MANDATE OF THE CONSTITUTION OF THE UNITED STATES TO ADOPT, IN THE ABSENCE OF STATE REQUIREMENTS, RULES THAT PREVENT A TAKING OF A CITIZEN'S PRIVATE PROPERTY WITHOUT JUST COMPENSATION.

Admittedly, the general law will permit a tenant in common, absent fraud, from purchasing the entire fee in a partition sale. Tenants in common, however, are said to occupy a confidential relationship, one to the other, so that they are not at liberty to acquire antagonistic rights in the common land as against the remaining owners. Perkins v. Johnson, 178 Tenn. 498, 160 SW 2d 400 (1942). Yarbro v. Easley, 525 SW 2d 495, Tenn. (1974).

In the Washington proceeding, Hegewald contended great prejudice would result to the remaining owners if the property was not sold in gross for its true value, namely $300,000.00. Later, however, when the same party asked for confirmation of a sale to him for $194,000.00, the Washington Courts appeared to have answered petitioners objections to confirmation by indirectly responding that the Washington law

permits a sale on partition to be treated in all respects as a sale on execution. It is petitioners' view that absent statutory safeguards Court imposed rules must be made in situations where their absence would result in such unfairness as to defeat the Constitutional guarantee of due process.

In Jones v. Bridges, 330 So. 2nd 1113, Ala. (1976), it was held that it is the duty of the Court in the absence of redemption statute to see that a reasonably fair price is obtained on a partition sale.

The same rule was recognized in Hegewald v. Neal, 28 Wn. App. 783 (1981), when the Washington Court of Appeals stated: "In a partition action a trial court has great flexibility in fashioning appropriate relief.

When the Washington Court of last resort stated that Washingon applies the rule that partition sales will be conducted the same as execution sale. The Washington

court also inferentially noted that as long as the sale complied with common law and statutory requirements, it must be confirmed. This position is in conflict with the rule that due process required the adoption of procedural safeguards tailored for each situation to prevent the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy of government officials.

The practical effect of the Washington opinion adopted by their states' court of last resort was in direct conflict with the opinion of this court in Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed.2d 349 (1969), and the general law throughout the United States, including case law handed down in Olympic Forest Products Inc. v. Chaussee Corp., 82 Wn.2 418, 511 P2 1002 (1973) and Larson v. Fetherston, 44 Wis.2d 712, 172 NW 2d 20 (1969).

THIS COURT SHOULD GRANT A WRIT TO RESOLVE THE AMBIGUITY THAT PRESENTLY EXISTS UNDER THE WASHINGTON LAW PROMULGATED BY ITS TWO CONFLICTING DECISIONS IN HEGEWALD v. NEAL, AND WHICH LEAVE A TENANT IN COMMON WITH NO DEPENDABLE GUIDELINES AS TO HOW HE CAN PROTECT A TAKING OF HIS LAND WITHOUT JUST COMPENSATION.

Petitioners' land was purchased by Hegewald for $194,000.00, $106,000.00 less than Hegewald claimed it was worth on partition sale. The Washington Court in answer to petitioners' claim that the net result was unfair seemed to respond the sale had to be confirmed in the same manner as a sale on execution is confirmed inasmuch as a taking of the fee by the purchase was not a taking in the constitutional sense. The ambiguity produced by the two conflicting decisions calls for an applicable definition of what the Washington Supreme Court meant when it defined

"due process" in Olympic Forest Products, Inc. v. Chaussee Corp., 82 Wn. 2 418, 511 P2 1002 (1973) wherein it was stated:

> "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compound of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.
>
> Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 162-163, 71 S. Ct. 624, 643-644, 95 L.Ed. 817 (1951). (Frankfurter, J., concurring.)

> This flexibility means that 'A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case.'
>
> Bell v. Burson, 402 U.S. 535, 540, 91 S.Ct. 1586, 1590, 29 L.Ed.2d 90 (1971). The procedural safeguards afforded in each situation should be tailored to the specific function to be served by them. See Goldberg v. Kelly, 397, U.S. 254, 267, 90 S.Ct. 10011, 25 L.Ed.2d 287 (1970). Also, in determining the specific procedures required by due process under any given set of circumstances we must consider:
>
> The precise nature of the interest that has been adversely affected, the manner in which this was done, the reason for doing it, the available alternatives to the procedure implicit in the office of the functionary whose conduct is challenged, [and] the balance of hurt complained of and good accomplished . . . ."

CONCLUSION

To preserve public confidence in the integrity of our system of justice it is necessary that dependable rules be formulated by state courts to prevent a taking of a citizen's property without due

process. Here, the effect of the Washington decision is to render to Hegewald condemnation rights superior to any governmental entity at the expense of your petitioner. The flexibility of the Fourteenth Amendment to the Constitution of the United States required that petitioners' property rights be adequately protected. The record below demonstrates petitioner's rights were not so protected and for this reason it is respectfully requested that this Court grant the writ as prayed.

Respectfully submitted,

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IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

R. M. HEGEWALD and HELEN HEGEWALD, husband and wife,	)
Respondents,	)
v.	)
FRANCES NEAL, as Guardian of Katherine Haines; JOAN BEASLEY NIBLER; FRANCES BEASLEY NEAL, WILLIAM HANNAFORD: ANDREW ST. MARTIN: ELI ST. MARTIN: PRESQUE ST. MARTIN: ISADORE ALBERT ST. MARTIN: OLIVIA ST. MARTIN: JOSEPH D. ST. MARTIN, individually and as Trustee,	)
Appellants.	)

No. 4074-II

Division Two

Filed: April 9, 1981

REED, C.J. -- This case is a sequel to Hegewald v. Neal, 20 Wn. App. 517, 582 P.2d 529 (1978), in which this court affirmed an order requiring 140 acres in Skamania County, including the property commonly known as the St. Martins Hot Springs Resort, to be partitioned by sale.

Defendants Neal and St. Martin (hereinafter referred to as the St. Martins), owners of approximately a one-fifth interest in the property, now appeal an order confirming the sale to plaintiff Hegewald, the owner of four-fifths of the property, for $194,000. We affirm.

The long and at times tortuous history of this litigation confirms Judge Soule's observation in our first opinion that

> [t]enancy in common, like marriage, can be an unhappy relationship and the process of dissolution may be prolonged, painful and expensive.

Hegewald, 20 Wn App 518. Fortunately, for purposes of this appeal, only a brief review of that history is necessary.[1] In October 1976, the Skamania County Superior

1. For a more detailed discussion of the factual background of this case, see our first opinion, Hegewald v. Neal, 20 Wn. App. 517, 519-20, 582 P2d 529 (1978)

Court ordered the subject property to be partitioned for sale, finding that the property could not be partitioned in kind without "great prejudice" to the owners resulting. On appeal we affirmed, holding that the court's finding of "great prejudice" was supported by evidence that if partitioned in kind the aggregate value of the property would be $200,000, whereas if kept whole the property was worth $300,000. We further held that the trial court's conclusion that the property could not be partitioned in kind was supported by evidence showing the practical problems of dividing and separating the water available from the hot springs.

On remand the sale of the property was set for February 1979. On the St. Martin's motion the sale was postponed until April in order to allow greater publicity regarding the sale. At the time the

sale was postponed, the court also ruled that cash bids would be required unless all parties agreed to accept a bid which included the extension of credit to the purchaser. No upset price was requested by any party. The property was sold in April to Hegewald, who was the only bidder, for $194,000. The St. Martins now appeal the order confirming the sale.

The St. Martins' principal contention is that the sale price of $194,000 was so inadequate as to justify setting aside the sale. According to the St. Martins, the $194,000 figure represents only two-thirds of the fair market value of the property as determined by the court in initially ordering the sale. To confirm a sale for only $194,000, argue the St. Martins, would defeat the very reason for ordering the sale in the first place, as we held that if partitioned in

kind the aggregate value of the property would be only $200,000 whereas the property as a whole was worth $300,000.[2]

To determine the adequacy of a partition sale Washington applied the rule of execution sales that a sale price will be set aside only on grounds of inadequacy if the disparity between the sale price and the fair market value is "so gross as to shock the conscience." Prince v. Mottman, 84 Wash. 287, 301, 146 P. 841 (1915), quoting from Johnson v. Johnson, 66 Wash. 113,116,119 P. 22 (1911). While the St. Martins urge us to adopt a standard that would allow greater scrutiny of

2. In making this argument the St. Martins fail to recognize that the disparity in property values between a partition in kind and a partition sale was not the only consideration in our affirming the order of sale. Of paramount importance was the evidence of the impracticality of partitioning in kind the waters from the hot springs.

the price of a partition sale, we believe it unnecessary to reach that issue, for we hold that under any standard the $194,000 figure is adequate. We base this holding on the fact that the only evidence in the record of the fair market value of the property at the time of the sale is the sale itself.

At the confirmation hearing the St. Martins urged the trial court to set aside the sale but offered no evidence of what the fair market value of the property was despite the fact that the burden of proof rested with them.[3] Instead the St. Martins

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3. We can foresee a situation where it may be more equitable to place this burden on the party seeking to confirm the sale. This would be particularly true of a sale such as this, where the co-tenant forcing partition is also the buyer. In these circumstances, if the buyer secures an order of sale based solely on his own evidence of a substantial disparity in value, then it would ill behoove him to offer less without having to assume the burden

relied exclusively on the $300,000 value placed on the property approximately 3 years earlier at the time of the initial partition order. In essence, the St. Martins asked the trial court and now ask this Court to take judicial notice of the fact that because of inflation the value of the property did not decline in the intervening years.[4] Courts may take judicial notice of facts within the common knowlege of the community. Rogstad v. Rogstad, 74 Wn. 2d 736, 446 P2d 340 (1968). While judicial notice of inflationary trends may be appropriate, Gordon v. Gordon, 44 Wn.2d 222, 226 P2d 786 (1954), it would be inappropriate through judicial notice to

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of showing a decrease in value. As we noted above, however, the initial order of sale in this case was not based solely on the disparity of property values but also recognized the difficulty of partitioning the water from the hot springs.

4. At the confirmation hearing the attorney for Hegewald stated that he was prepared to present evidence that the

apply such a trend to specific property. See San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Electric Co., 28 Cal. App 3d 556, 104 Cal Rptr 733 (1972); Sanborn v. Sanborn, 78 Ill. App 3d 146, 396 N.E.2d 1192 (1979); Moss v. Moss, 379 So.2d 1206 (La. App. 1980). Consequently, because nothing in the record indicates that the property sold for anything but its fair market value at the time, we cannot say the sale price is inadequate.

The St. Martins also contend that an upset price should have been set. In a partition action a trial court has great flexibility in fashioning appropriate relief. Cummings v. Anderson, 94 Wn.2d 135, 614 P.2d 1283 (1980). As noted above, the St. Martins, at an earlier hearing, did not

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property had in fact declined in value. Because the St. Martins had the burden of presenting the evidence on this issue, this evidence was never offered.

request an upset price be placed on the sale despite the trial court's amenability to structuring the sale according to the desires of the parties. Consequently, we believe the trial court did not abuse its discretion in not setting an upset price.

Finally, the St. Martins contend the partition sale violates due process of law, as the sale amounts to the taking of private property of an individual for the private use of another. We find this argument unpersuasive. As co-tenants the St. Martins' interest in the property was subject to the rights of the other co-tenants. One of these rights is the right to seek partition. Reilly v. Sagesar, 2 Wn. App. 6, 467 P.2d 358 (1970). A partition action is analogous to any type of dissolution proceeding and does not involve a "taking" in the constitutional sense. See Medley v. Medley, 61 Tenn, App. 331, 454 S.W.2d

142 (1970); Metcalf & Simpson v. Hoopingardner, 45 Iowa 510 (1877). Consequently, the sale does not violate due process.

The order confirming the sale is affirmed.

/s/ C. J. Reed

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

R. M. HEGEWALD and HELEN HEGEWALD, husband and wife,

Respondents,

v.

FRANCES NEAL, as Guardian of Katherine Haines; JOAN BEASLEY NIBLER; FRANCES BEASLEY NEAL; GERALDINE HANNAFORD CROWLEY, and WILLIAM HANNAFORD,

Defendants.

ANDREW ST. MARTIN; ELI ST. MARTIN: PRESQUE ST. MARTIN; ISADORE ALBERT ST. MARTIN: OLIVIA ST. MARTIN; JOSEPH D. ST. MARTIN, individually and as Trustee,

Appellants.

No. 2624-II

Division Two

Filed: June 27, 1978

SOULE, J. -- Tenancy in common, like marriage, can be an unhappy relationship and the process of dissolution may be prolonged, painful and expensive.

This is a partition action brought pursuant to RCW 7.52.010. The property was originally homesteaded by ancestors of the St. Martins. They now retain a one-fifth interest. The evidence reveals that it is an unusually complex property in its composition. It consists, in part, of a plateau area with some timber of no more than modest commercial value on the west side of the Wind River. The grade is gentle; the area is approximately 140 acres, 126 of which are readily developable for home sites. On the east side of the Wind River there are approximately 65 acres of very steep and hilly land which is not easily accessible nor suitable for development. The balance of the property is located along the Wind River Canyon itself and consists of approximately 35 acres, 14 of which are suitable for building purposes. This latter area contains

some old buildings the former St. Martins Hot Springs Resort. The buildings are of little economic worth. The hot springs themselves arise in the Wind River and have been somewhat developed. All agree that they are an unusual amenity and apparently have substantial value if used in connection with the rest of the land, but not otherwise.

In the course of the action, the court heard extensive evidence and initially ruled that there should be partition in kind. On June 13, 1975 it appointed three referees with directions

> to examine the property in question and make such further investigation as necessary as to the feasibility of physical partition . . . and to submit a plan for such physical partition if the same is possible.

Pursuant to that order, three referees were directed by a letter of instruction to work together on the task assigned by the court, to-wit, "whether, and how

physical partition may be accomplished. . ." They met together on three occasions in 1975 but did not function effectively as a committee. Referee Lundstrom seems to have been unavailable in 1976. The other two met further in 1976 and filed a report recommending against partition in kind.

A minority report was thereafter filed by Lundstrom urging partition in kind. His report recognizes that the most valuable amenity connected with the land consists of the sources of hot mineral water on the property. That report proposes partitioning the water by collecting it and assigning it through a metering and distribution system, so that it can be shared by the owners of the land in accordance with their percentage of ownership.

The court received the reports of the referees. The St. Martins' interests filed exceptions to the majority report. In substance, the exceptions challenged the

validity of the referees' report because the majority report was composed without conference with the third referee. The exceptions further questioned the power of the referees to recommend against partition in kind and the general adequacy of the investigation and consideration given by the referees.

Thereafter, the court scheduled argument but did not order a further evidentiary hearing. At the conclusion of the arguments, the court reversed its initial decision and entered findings based upon the evidence previously received and the report of the two referees. It ordered partition by sale rather than partition in kind. We affirm the order.

The appellants present six assignments of error, but essentially these assignments raise three issues. (1) Whether the court can authorize referees to consider the feasibility of partition in kind.

(2) Whether the majority report of the referees recommending against partition in kind is factually and legally sufficient. (3) Whether there is substantial evidence to support the findings and conclusions ultimately entered by the trial court.

Issue No. 1. It is the appellants' position that the referees have authority only to devise a method of partition in kind. With this we cannot agree. The order of June 13, 1975 specifically directed the referees to consider the feasibility of physical partition and to submit a plan for such physical partition if the same is possible, and the court's written instructions to the referees dated August 13, 1975 specifically directed them to consider whether and how physical partition may be accomplished. The appointment of the referees is authorized by RCW 7.52.080 which provides:

> If it be alleged in the complaint and established by evidence or if it appear by the evidence without such allegation in the complaint to the satisfaction of the court, that the property or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise, upon the requisite proofs being made, it shall decree a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees, therefor, and shall designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained.

A subsequent section provides for the contingency that although an initial order of partition in kind has been entered, the referees may find, after investigation, that it cannot be accomplished without great prejudice to the owners. RCW 7.52.130 provides:

> If the referees report to the court that the property, of which partition shall have been decreed, or any separate portion thereof is so situated that a partition thereof cannot be made without great prejudice to the owners, and the court is satisfied

> that such report is correct, it may thereupon by an order direct the referees to sell the property or separate portion thereof.

We hold that this latter statute authorizes the procedure adopted by the court and the referees whereby an initial determination for partition in kind can be reconsidered by the court if the referees report back that partition cannot be made without great prejudice to the owners and the court is satisfied that such report is correct.[5]

Issue No. 2. Was the majority report legally and factually adequate to justify reconsideration by the trial court and the subsequent order of sale?

Resolution of this issue requires an understanding of the physical features of

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5. After the receipt of the referees' report, recommending against partition in kind, and upon exception being taken thereto, it would have been appropriate for the court to conduct a further evidentiary

the property previously described and which were disclosed by the evidence received prior to the appointment of the referees, a consideration of the contents of the report in the light of that evidence, and attention to statutory requirements such as they are.

The law favors partition in kind whenever practicable. Before a sale can be ordered, in preference to a partition in kind, the court must find by evidence that the property or any part of it is so situated that partition in kind cannot be made without great prejudice to the owners. RCW 7.52.080. Huston v. Swanstrom, 168 Wash. 627, 13 P2d 17 (1932); Williamson Investment co. v. Williamson, 96 Wash. 529, 165

hearing. Cf. Williamson Investment Co. v. Williamson, 96 Wash. 529, 165 P. 385 (1917) and Hamlin v. Hamlin, 90 Wash. 467, 155 P. 393 (1916). However, in an examination of the record we have been unable to find that a request for such a hearing was made.

P. 385 (1917). Williamson defines great prejudice to mean material pecuniary loss and the burden of proof is upon the one asserting it. The court's finding No. 10 contains the required finding.[6]

If the referees who are appointed to accomplish a partition in kind report to the court that partition in kind is inappropriate, then RCW 7.52.130 requires that the recommendation must be based on findings that the partition of property in kind, or any separate portion of it, cannot be made without great prejudice to the owners and the court must be satisfied that such report is correct.

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6. Finding of fact No. 10 reads: "That considering the record in this case and all of the evidence presented, the real property is so situated and the circumstances thereof are such that partition thereof in kind cannot be effected without great prejudice to the owners and a sale of the entire property is necessary."

The majority report of the referees dated April 23, 1976 does not contain the statutory formula wording, "great prejudice to the owners." Rather, after discussion of the problems created by the area and topography of the property, the conditions of the structures, the timber values and the hot springs, it concluded:

> We feel the partition of the property is not justified for the following reasons: to partition in a fair and equitable manner, all of the acreage should be divided into percentages as related to the parties involved. This would also pertain to the water and furniture and fixtures. We feel to do this would destroy the usefulness of the property. (Emphasis added.)

While these words are not phrased in the exact language of the statute, we find them to be substantially equivalent in view of the evidence and case law defining great prejudice. This is especially true in view of the fact that the physical partition plan proposed by John Lundstrom, the minority referee, is based on the continued

common ownership of the hot springs. Indeed, the minority report, by recommending that the hot springs be retained in common, that cost of improvements be assessed to the owners proportionately, and that the waters be distributed and charged for on a monthly basis, lends support to the conclusion that partition is not feasible.

In Brown v. Cooper, 98 Iowa 444, 67 N.W. 378 (1896), the decision of the trial court ordering partition in kind, including a division of a water resource, was reversed. The court said at page 454:

> The object of partition proceedings is to enable those who own property as joint tenants, or co-parceners, or tenants in common to so put an end to the tenancy as to vest in each a sole estate in specific property or an allotment of the lands or tenements. It contemplates an absolute severance of the individual interests of each joint owner, and, after partition, each had the right to enjoy his estate without supervision, let, or hindrance from the other. Unless this can be accomplished,

> then the joint estate ought to be sold, and the proceeds divided. Courts should be, and are, adverse to any rule which will compel unwilling persons to use their property in common.

In the Brown case, the court went on to note that the proposed arrangement for the division of waters was not a partition. The trial judge in the present case made a similar observation when he stated that the recommendation in the minority report was the very antithesis of partition.

Appellants further contend that the report of the majority of the referees is legally insufficient because they did not meet together and give joint consideration to the problems presented by the land. No authority is cited to support the proposition that the report is legally insufficient for this reason.

Of course if a statute specifically requires the referees to meet together, their failure to do so will invalidate

their report. Tolsma v. Tolsma, 180 Mich. 79, 146 N.W. 412 (1914). In the absence of a statute so requiring, it does not appear that all referees must be present at all times. Cross v. Cross, 56 W.Va. 185, 49 S.E. 129 (1904). The partition statute of our state does not specifically require the referees to meet together and we see no reason to invalidate the majority report under the facts disclosed by this record. Apparently all referees met together for preliminary purposes on September 6 and December 28, 1975. Thereafter, referee McEvoy attempted to arrange meetings and gave adequate notice to referee Lundstrom. On at least two occasions, however, referee Lundstrom did not attend nor communicate with the other two.[7] He did eventually file a minority

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7. In fairness it should be noted that his absence was due to business demands requiring his presence in Texas.

report thereby making his views known to the trial judge. While this procedure is not ideal, we nevertheless believe it legally sufficient absent a statute setting other standards.

Appellants urge that the referees' majority report is insufficient for the reason that it proposes no specific plan of partition in kind. We have heretofore noted that RCW 7.52.130 permits the referees to report that in their opinion such a partition is not feasible even though they are under a primary duty to partition in kind if they can. The majority report discloses that they were familiar with the property. In addition, all referees had been furnished with such material from the evidentiary hearing as counsel desired them to possess. In light of the evidence already before the trial judge, the reports apparently were usable by him. No standards for factual content

are fixed by statute. Although the reports are brief, they adequately disclose the problems of dividing this complex property in kind and note that division will destroy the usefulness of at least some of the features, particularly the water. In our judgment, its factual content is sufficient to warrant its use by the trial judge.

Issue No. 3. Appellants assign error to entry of findings of fact Nos. 9[8] and 10 and conclusion of law No. 1.[9]

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8. Finding of fact No. 9 reads: "That this property involves a number of different elevations with different valuations assigned to portions of the property. It is unique in that located on one portion of the property, there are hot springs. That it would not be possible to make any practical division and separation of the waters available from the springs and to attempt to do so would force the various persons into an involuntary business relationship which the court finds would not be justified and would depreciate the value of the individual interests of the existing defendants in this litigation."

Based on our review of the record, we are convinced that finding No. 9 adequately characterizes the land as previously described by the witnesses, and is therefore supported by substantial evidence. The thrust of the objection to finding No. 10 is that there is no evidence that partition cannot be effected without great prejudice to the owners.

The record discloses, particularly through the respondents' witness, Jack Jarvis, that the land has three development possibilities. The first is for single-family residences catering to the local housing needs. The second is for a

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Finding of fact No. 10 has been previously set forth.

9. Conclusion of law No. 1 reads: "That the described property considering all features touching upon the value of the tract as a single tract cannot be partitioned in kind and should be sold to the highest bidder, or bidders, for cash."

resort oriented to the hot springs. The third is for a combination of the first two, in which case the market for lots would be larger because it would appeal to families seeking sites for recreational second homes. These families would logically come from the Portland, Oregon metropolitan area and beyond.

Jarvis testified that if partitioned in kind and used only for residential development, the aggregate value of all of the land would be $200,000. There is further evidence that if kept as one unit, but developed solely for residential purposes, its value would be from 10 to 15 percent higher because of plottage value, the increased value due to unified ownership.

The witness further testified that if the land is partitioned in kind, it cannot be feasibly developed for the

logical higher and better use of a resort-recreational development for which purpose he estimated its present market value to be up to $300,000. The same witness suggested substantially higher potential values in the future if the land could be held as a unit but the trial judge declined to consider these higher values because they were not present values. The record thus demonstrates substantial evidence of differences in aggregate value depending on whether the land is partitioned in kind or sold.

In the Williamson case, where it was urged that physical division would reduce the aggregate value of the halves by 10 to 30 percent, the court held that this was not sufficient prejudice to justify a sale. That holding, however, was made against the background of evidence of a real estate market so severely depressed that

a court-ordered sale probably would have resulted in even greater loss. The factor of a depressed market is absent in this case. We hold that the trial court's finding and conclusion of great prejudice is supported by substantial evidence that this unusual property worth $300,000 would be worth only $200,000 if partitioned in kind and such a difference is properly termed a "substantial pecuniary loss."

The order of the trial court directing a sale is therefore affirmed.

/s/ Soule, J.

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION II

R. M. HEGEWALD and HELEN HEGEWALD, husband and wife,	)
Respondents,	)
v.	)
FRANCES NEAL, as Guardian of Katherine Haines; JOAN BEASLEY NIBLER: FRANCES BEASLEY NEAL, WILLIAM HANNAFORD; ANDRES ST. MARTIN; ELI ST. MARTIN; PRESQUE ST. MARTIN; ISADORE ALBERT ST. MARTIN; OLIVIA ST. MARTIN; JOSEPH D. ST. MARTIN, individually and as Trustee,	)
Appellants.	)

No. 4074-II

ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered this motion and has determined that it should be denied. Accordingly, it is

ORDERED, that the motion is denied.

DATED this 13th day of May, 1981.

/s/
CHIEF JUDGE

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

The specific order appealed from states: Hegewald et al, Respondents v. Neal et al, No. 47804-0; Petition for Review of a Decision of the Court of Appeals, April 9, 1981.

28 Wn. App. 783

Denied July 17, 1981. See 95 Wn^2 1029 __ P2 __ (1981).

CERTIFICATE OF SERVICE

I certify that I served the foregoing Petition for a Writ of Certiorari upon Robert Leick, Attorney for Respondents, on December ____, 1981, by mailing two certified true copies in a sealed envelope with postage prepaid, addressed to said attorney at his regular office address as shown below:

Stevenson, Washington 98648

_____